

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

*)
STEWART HANDTE,)
Plaintiff,) 3:10-CV-00111-LRH-RAM
v.)
JAMES G. MILLER, an individual; STOREY)
COUNTY, a political subdivision of the State)
of Nevada; GERALD ANTINORO, an)
individual,)
Defendants.)

)

ORDER

Before the court is Defendants James G. Miller, Storey County and Gerald Antinoro's Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to FRCP 12(b)(6) (#9¹). Plaintiff Stewart Handte filed an opposition (#10), Defendants filed a reply (#13), and at the court's direction Plaintiff filed a sur-reply (#19).

I. Facts and Procedural History

This action arises out of Plaintiff's employment and the termination of his employment as a deputy sheriff with the Storey County Sheriff's Office. Defendant Miller was the Sheriff and defendant Antinoro was a lieutenant with the Sheriff's Office during the time period in question,

¹Refers to the court's docket entry number.

1 November 2007 to August 2008. Plaintiff's claims are based on the following series of events, as
2 alleged in the First Amended Complaint (#5).

3 In November 2007, Plaintiff was disciplined by Sheriff Miller and Lieutenant Antinoro
4 with a one-day suspension and written reprimand for going to socialize with co-workers off-duty
5 after having called in sick to care for his seriously ill mother. Doc. #5, p. 2. Plaintiff alleges the
6 department's sick leave policy did not prohibit such activity, and that his sick leave was qualified
7 leave under the Family and Medical Leave Act of 1993 ("FMLA"). *Id.*

8 In December 2007, Sheriff Miller "awarded" Plaintiff with a statue of the hind end of a
9 horse in front of his colleagues, implying "that Plaintiff was unfit for his duties and that he was a
10 'horse's ass'." *Id.* This "created an atmosphere . . . of ostracism as the Sheriff had rendered
11 Plaintiff a pariah," and it "resulted in almost daily incidents with colleagues and management." *Id.*

12 Commencing in July 2008, a "purported investigation was conducted at the behest of
13 Defendants regarding a discharge of a weapon at the shooting range by Plaintiff." *Id.* While that
14 investigation was ongoing, Plaintiff complained that a thorough Internal Affairs investigation over
15 the incident had not been completed and that he had not been interviewed. *Id.* at 3. Plaintiff also
16 "criticized the new firearms training that required officers to point weapons at fellow employees, as
17 unsafe, dangerous and illegal." *Id.* Plaintiff alleges this criticism was not a part of his job duties,
18 and it "pointed out a danger, a level of discomfort, a refusal to violate law, and a policy contrary to
19 traditional firearms philosophy and workplace safety at a public agency." *Id.* Plaintiff ultimately
20 received a two-day suspension without pay that was issued by Lieutenant Antinoro and ratified by
21 Sheriff Miller; however, Plaintiff alleges "[t]he investigation was a ruse to create discipline for
22 Plaintiff" and "[t]he discipline was unwarranted because Plaintiff had not negligently handled his
23 weapon and had not refused to obey an order." *Id.* at 2. Instead, Plaintiff alleges, the discipline
24 was retaliation for his speech: "The Defendants did not appreciate Plaintiff's candidness, *i.e.*, his
25 free speech, and determined a two-day suspension without pay as a result." *Id.* at 3.

1 During a grievance meeting on July 24, 2008, Plaintiff again complained that his rights to
2 proper investigative proceedings under Chapter 289 of the Nevada Revised Statutes had been
3 violated during the course of the investigation. *Id.* Furthermore, Plaintiff's representative made
4 statements on Plaintiff's behalf about "the changing of the practice of when an employee starts and
5 ends overtime." *Id.* "Immediately following these statements by Plaintiff and his representative,
6 the Sheriff told Plaintiff that he was 'dangerously close to being terminated'." *Id.* at 4.

7 Plaintiff resigned approximately one month later, on August 26, 2008. Plaintiff alleges he
8 resigned "(1) in order to avoid a termination, which would be a black mark upon his record in
9 addition to the adverse employment actions already imposed by Miller, and (2) because his
10 working environment had become intolerable to a reasonable person such that he would feel
11 compelled to resign." *Id.* (footnote omitted).

12 Plaintiff filed his original complaint (#1) initiating this action on February 25, 2010. After
13 Defendants moved to dismiss the case (#4), Plaintiff amended his complaint by revising his
14 allegations and adding two claims for relief. The presently-operative First Amended Complaint
15 (#5) asserts four claims: (1) First Amendment retaliation under 28 U.S.C. § 1983 against all three
16 defendants—Miller, Antinoro and Storey County; (2) constructive discharge against Storey
17 County; (3) interference with FMLA rights against Miller and Storey County; and (4) defamation
18 against Miller. Miller and Antinoro are sued solely in their individual capacities.

19 Arguing that the amendments did not change the basis for dismissal of Plaintiff's suit,
20 Defendants filed a motion for re-submission of their motion to dismiss (#6). However, following
21 an objection by Plaintiff regarding the propriety of such a procedure, Defendants agreed to
22 eliminate any confusion by filing a separate motion to dismiss Plaintiff's first amended complaint
23 (#9)—the motion now before the court. Plaintiff filed an opposition (#10), and Defendants filed a
24 reply (#13). Because Defendants made a substantial showing that Plaintiff' third and fourth claims
25 for relief are time-barred but raised such issues for the first time in their reply memorandum, the
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1 court entered an order (#18) affording Plaintiff the opportunity to file a sur-reply addressing why
 2 the claims should not be dismissed. Plaintiff accordingly filed a sur-reply (#19) contesting the
 3 dismissal of his FMLA claim but conceding that his defamation claim is untimely.

4 **II. Legal Standard**

5 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
 6 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to
 7 state a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
 8 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
 9 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
 10 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require
 11 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
 12 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129
 13 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

14 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
 15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
 16 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
 17 the court to draw the reasonable inference, based on the court’s judicial experience and common
 18 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
 19 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
 20 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
 21 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
 22 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

23 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
 24 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
 25 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*

1 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
 2 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
 3 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
 4 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
 5 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
 6 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.* (quoting *Iqbal*, 129 S. Ct. at
 7 1949).

8 **III. Discussion**

9 **A. First Amendment Retaliation**

10 Plaintiff alleges that Defendants retaliated against him for exercising his First Amendment
 11 right to free speech. “It is well settled that ‘a State cannot condition public employment on a basis
 12 that infringes the employee’s constitutionally protected interest in freedom of expression.’”

13 *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick v. Meyers*, 461 U.S. 138, 142
 14 (1983)). Generally, “[t]o sustain a First Amendment retaliation claim, a public employee must
 15 show (1) the employee engaged in constitutionally protected speech, (2) the employer took adverse
 16 employment action against the employee, and (3) the employee’s speech was a ‘substantial or
 17 motivating’ factor in the adverse action.” *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d
 18 1121, 1126 (9th Cir. 2008) (quoting *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006)).

19 Noting that “First Amendment retaliation law has evolved dramatically, if somewhat
 20 inconsistently,” the Ninth Circuit has clarified and explained the appropriate approach to assessing
 21 a First Amendment retaliation claim. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). In
 22 doing so, the court outlined the following sequential, five-step series of questions to be answered in
 23 a First Amendment retaliation case: (1) whether the plaintiff spoke on a matter of public concern;
 24 (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s
 25 protected speech was a substantial or motivating factor in an adverse employment action; (4)

1 whether the state had an adequate justification for treating the employee differently from other
 2 members of the general public; and (5) whether the state would have taken the adverse
 3 employment action even absent the protected speech. *Id.*

4 Determining whether the speech at issue touched on a matter of public concern is purely a
 5 question of law properly decided on a motion to dismiss. *Gibson v. Office of Atty. Gen., State of*
 6 *Cal.*, 561 F.3d 920, 925 (9th Cir. 2009). The plaintiff “bear[s] the burden of showing that [his]
 7 speech addressed an issue of public concern based on the content, form, and context of a given
 8 statement, as revealed by the whole record.” *Desrochers v. City of San Bernardino*, 572 F.3d 703,
 9 709 (9th Cir. 2009) (citations and internal quotation marks omitted).

10 The “greatest single factor” in determining whether speech addressed a matter of public
 11 concern is the content of the speech. *Id.* (citation omitted). “If employee expression relates to an
 12 issue of ‘political, social, or other concern to the community,’ it may fairly be said to be of public
 13 concern.” *Brewster v. Lynwood Unified Sch. Dist.*, 149 F.3d 971, 978 (9th Cir. 1998) (*quoting*
 14 *Connick*, 461 U.S. at 146). In particular, speech addresses a matter of public concern where it
 15 involves “issues about which information is needed or appropriate to enable the members of
 16 society to make informed decision about the operation of their government.” *Desrochers*, 572 F.3d
 17 at 710 (citation omitted). “On the other hand, speech that deals with ‘individual personnel disputes
 18 and grievances’ and that would be of ‘no relevance to the public’s evaluation of the performance of
 19 governmental agencies is generally not of ‘public concern.’” *Coszalter v. City of Salem*, 320 F.3d
 20 968, 973 (9th Cir. 2003) (citation omitted).

21 In addition, the form and context of Plaintiff’s speech are also relevant to the court’s
 22 assessment of whether the speech is protected under the First Amendment. *Ulrich v. City &*
 23 *County of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002). In the analysis of form and context,
 24 the court focuses on the purpose or “‘the *point* of the speech,’” and it considers “such factors as the
 25 ‘employee’s motivation and the audience chosen for the speech.’” *Id.* (citations omitted).

1 Plaintiff's First Amendment retaliation claim is based on three categories of speech: (1)
2 complaints that his statutory rights to a thorough Internal Affairs investigation had been violated;
3 (2) criticism of the changed practice of when an employee starts and ends overtime; and (3)
4 criticism of the new firearms training policy that required officers to point weapons at fellow
5 employees. Doc. #5, p. 3. The court will analyze each category of speech in turn.

6 **1. Internal Affairs Investigation**

7 Plaintiff contends that his criticisms of the Internal Affairs investigation into the discharge
8 of his firearm at the shooting range "were of public concern because they . . . pertained not only
9 [to] his grievance but to the broader rights of all officers under Nevada Revised Statutes Chapter
10 289 to proper investigative proceedings," and that he "was attempting to establish precedent for
11 future investigations." Doc. #5, ¶ 15. Plaintiff further argues in his opposition memorandum that
12 he "is a veteran police officer, with notable experience in representation of peace officers,
13 including as president of the association of highway patrolmen in the Nevada Highway Patrol."
14 Doc. #10, p. 4.

15 Despite Plaintiff's "post hoc characterizations" regarding the broad import of his speech,
16 *Desrochers*, 572 F.2d at 711, the complaint reflects that Plaintiff's actual statements were made not
17 in the capacity of a representative or advocate for officer rights generally, but on behalf of himself
18 and in regard to an ongoing, internal investigation into his own conduct. Doc. #5, ¶ 14 ("Before
19 the investigation was completed and any discipline decided upon, Plaintiff complained that a
20 thorough Internal Affairs investigation over the incident had not been completed, and that he had
21 not been interviewed."); *id.* at ¶ 19 ("During a grievance meeting on July 24, 2008, Plaintiff further
22 explained why his rights under NRS Chapter 289 had been violated in the course of the
23 investigation . . ."). Such speech is at the core of what is properly considered an individual
24 personnel dispute or grievance. *See Connick*, 461 U.S. at 148 ("mere extensions of Myers' dispute
25 over her transfer"); *Desrochers*, 572 F.3d at 715-16 ("motivated by their dissatisfaction with their
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1 employment situation”); *Havekost v. United States Dep’t of Navy*, 925 F.2d 316, 318 (9th Cir.
 2 1991) (“nothing more than a workplace grievance”). In criticizing the investigation, Plaintiff
 3 spoke “not as a citizen upon matters of public concern, but instead as an employee upon matters
 4 only of personal interest.” *Connick*, 461 U.S. at 147. To accept Plaintiff’s characterization would
 5 be to turn virtually every individual employee grievance into a potentially “precedent-setting”
 6 matter of broader public concern, swallowing the rule.

7 Plaintiff further contends that his criticisms of the Internal Affairs investigation touched on
 8 a matter of public concern because his speech pertained to a government agency’s violation of state
 9 law. However, a simple reference to or conclusory allegation of illegality does not automatically
 10 qualify as a matter of public concern. *See Desrochers*, 572 F.3d at 711. Besides generally citing to
 11 NRS Chapter 289 in his complaint, Plaintiff fails to identify any provision of that chapter the
 12 defendants allegedly violated. *See* Doc. #5, ¶¶ 15, 19; Doc. #10, pp. 2-6. And there is no
 13 indication that any of the defendants’ conduct that Plaintiff criticized was at all unlawful. *See* Doc.
 14 #5, ¶ 14 (“Before the investigation was completed and any discipline decided upon, Plaintiff
 15 complained that a thorough Internal Affairs investigation over the incident had not been completed,
 16 and that he had not been interviewed.”). Moreover, not every alleged violation of a statute or
 17 policy is of public import in evaluating the performance of a government agency. As this court has
 18 previously held, speech addressing a law enforcement agency’s alleged violation of the Nevada
 19 Revised Statutes does not touch on a matter of public concern where the provisions at issue govern
 20 the internal employment actions of law enforcement agencies and do not address public safety or
 21 otherwise have an effect on the public. *Simontacchi v. Nevada ex rel. Dep’t of Public Safety*, 2009
 22 WL 803119, *7 (D. Nev. 2009) (involving NRS § 281.153, which governs the compensation of
 23 public safety officers with disabilities). The alleged violation of Plaintiff’s individual rights under
 24 NRS Chapter 289, which governs the procedural rights of peace officers in internal administrative
 25 grievance proceedings, fits squarely within that category.

2. Overtime Policy

Plaintiff next contends that his representative’s statements on his behalf “about the changing of the practice of when an employee starts and ends overtime” touched on a matter of public concern—namely, officers’ pay. Doc. #5, ¶ 19; Doc. #10, p. 4. The Ninth Circuit has held that speech regarding police officers’ wages can touch upon a matter of public concern because “compensation levels undoubtedly affect the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of public concern.” *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). Nonetheless, not all speech on the topic of officer pay is necessarily or categorically entitled to First Amendment protection. Speech “not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.” *Connick*, 461 U.S. at 148 n.8.

In *McKinley*, the plaintiff spoke as a union representative and publicly criticized the city's decision not to give police officers an annual raise. 705 F.2d at 1112. The officer's speech was "specifically and purposefully directed to the public both through city council meetings and a television interview." *Id.* at 1115. In concluding that such speech touched on a matter of public concern, the court distinguished *Connick* as a case in which "almost all of the speech at issue dealt with a personal 'grievance concerning internal office policy'" and "the employee 'did not seek to inform the public' about the operation of a public agency; on the contrary, the employee's speech was directed at 'gather[ing] information for another round of controversy with her superiors.'" *Id.* at 1114 (quoting *Connick*, 461 U.S. at 148, 154) (brackets in original).

This case is closer to *Connick* than *McKinley*. Plaintiff did not seek to inform the public about the operations of the Sheriff's office as a representative of his fellow officers; rather, he spoke on an internal policy matter as an individual employee in a private grievance meeting and in the wake of an investigation and disciplinary action taken against him. *See Connick*, 461 U.S. at

1 148 (“mere extensions of Myers’ dispute over her transfer”); *cf. Roth v. Veteran’s Admin.*, 856
2 F.2d 1401, 1406 (9th Cir. 1988) (“Roth’s criticisms of the VA involved no personal employment
3 dispute. Nor were Roth’s comments precipitated by adverse actions of his supervisors pertaining
4 to his employment.”). Moreover, although the content of Plaintiff’s speech can be categorized as
5 relating to officer pay generally, there is no suggestion that his speech concerned the “competency
6 of the police force” through its ability “to attract and retain qualified police personnel.” *McKinley*,
7 705 F.2d at 1114. Plaintiff criticized a particular administrative policy—“the practice of when an
8 employee starts and ends overtime.” Doc. #5, ¶ 19. Such internal policy matters are “the minutiae
9 of workplace grievances,” not matters of broader societal concern. *Havekost*, 925 F.2d at 319
10 (involving “an internal dispute over the Navy’s dress code, scheduling, and responsibility for
11 certain lost commissary profits”).

12 Plaintiff argues in his opposition memorandum that his statements are of public concern
13 because they pertained to violations of wage and hour law and regulations. Doc. #10, p. 3.
14 Plaintiff's complaint contains no allegations supporting such a characterization; he alleges only
15 that statements were made "about the changing of" the overtime policy. Doc. #5, ¶ 19. But even
16 construing such vague allegations liberally, a mere reference to or suggestion of unlawful conduct
17 by a public official does not automatically qualify as speech on a matter of public concern.
18 *Desrochers*, 572 F.3d at 711. Plaintiff fails to identify any law that was allegedly violated or what
19 aspects of the new overtime policy were unlawful. And in any event, any alleged violations would
20 concern only the internal employment actions of a law enforcement agency. *Simontacchi*, 2009
21 WL 803119, *7.

3. Firearms Training Policy

23 Plaintiff finally contends that he spoke on a matter of public concern when “[h]e criticized
24 the new firearms training policy that required officers to point weapons at fellow employees, as
25 unsafe, dangerous and illegal.” Doc. #5, ¶ 14. Plaintiff alleges that his criticism “pointed out a

1 danger, a level of discomfort, a refusal to violate law, and a policy contrary to traditional firearms
2 philosophy and workplace safety at a public agency.” *Id.* at ¶ 15. Plaintiff’s criticism of the
3 firearms training policy occurred during the Internal Affairs investigation into Plaintiff’s discharge
4 of his firearm at the shooting range and contemporaneously with his complaints regarding that
5 investigation. *Id.* at ¶ 14.

6 Plaintiff’s speech regarding the firearms training policy presents a closer case than his
7 speech regarding the Internal Affairs investigation and the overtime policy. A police officer’s
8 statements on the topic of the training and safety of police officers could be “of public import in
9 evaluating the performance of the [Sheriff] as an elected official.” *Connick*, 461 U.S. at 148. As
10 already observed, however, speech “not otherwise of public concern does not attain that status
11 because its subject matter could, in different circumstances, have been the topic of a
12 communication to the public that might be of general interest.” *Id.* at 148 n.8. Whether
13 discussions of officer training and safety “could be matters of public concern is beside the
14 point—it does not answer whether *this* [communication] is such speech.” *Id.*

15 Regarding the content of Plaintiff’s speech, criticism of a particular police training practice
16 is not the prototypical officer safety issue that would be of public import in evaluating the
17 performance of Sheriff Miller as an elected official. Plaintiff did not blow the whistle on Sheriff
18 Miller for failing, for example, to adequately equip his deputies or otherwise provide for their
19 safety and protection in the field. *Cf. Gilbrook v. City of Westminster*, 177 F.3d 839, 866 (9th Cir.
20 1999) (en banc) (statements to the press questioning “the fire department’s ability to respond
21 effectively to life-threatening emergencies” touched on a matter of public concern). Instead,
22 Plaintiff raised a “philosoph[ical]” disagreement regarding a particular firearms training practice
23 within the Sheriff’s office that he believed to be dangerous and made him personally

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1 uncomfortable.² Doc. #5, ¶ 14-15. As the Supreme Court instructed in *Connick*, “[w]hile as a
 2 matter of good judgment, public officials should be receptive to constructive criticism offered by
 3 their employees, the First Amendment does not require a public office to be run as a roundtable for
 4 employee complaints over internal office affairs.” 461 U.S. at 149. That principle is no less true
 5 simply because the “internal office affairs” at issue involve inherent safety concerns, as do firearms
 6 training practices within a sheriff’s office.

7 Also critical to the court’s inquiry is the form and context of the speech, “particularly the
 8 *point of the speech.*” *Roth*, 856 F.2d at 1405. “In other words, why did the employee speak (as
 9 best we can tell)?” *Desrochers*, 572 F.3d at 715. “In a close case, when the subject matter of a
 10 statement is only marginally related to issues of public concern, the fact that it was made because
 11 of a grudge or other private interest or to coworkers rather than to the press may lead the court to
 12 conclude that the statement does not substantially involve a matter of public concern.” *Johnson v.*
 13 *Multnomah County, Or.*, 48 F.3d 420, 425 (9th Cir. 1995).

14 Here, Plaintiff did not speak “in order to bring wrongdoing to light” but “merely to further
 15 some purely private interest.” *Havekost*, 925 F.2d at 318. Plaintiff did not voice his concerns at a
 16 staff meeting or request a meeting with his superiors to discuss the training policy. *Cf. Ulrich v.*
 17 *City & County of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002). Rather, Plaintiff criticized the
 18 firearms training practice while criticizing an ongoing investigation into the discharge of his own
 19 firearm at the shooting range. Although Plaintiff alleges that he “had not negligently handled his
 20 weapon and had not refused to obey an order” and that the investigation was “a ruse to create
 21 discipline for Plaintiff,” that does not negate the context in which he spoke. Doc. #5, ¶¶ 11, 13.
 22 According to Plaintiff’s own allegations, he did in fact discharge his firearm, the investigation was
 23 initiated before any of the speech on which he bases his First Amendment retaliation claim, he

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 25 ²While Plaintiff alleges that his speech addressed an “illegal” government policy, Doc. #5, ¶ 14,
 26 Plaintiff again fails to identify any law that may have been violated or otherwise substantiate his
 conclusory allegation.

1 considered the investigation to be unwarranted and illegitimate, and he criticized the firearms
 2 training policy during the course of that investigation. *Id.* at ¶¶ 11, 13-14. Indeed, Plaintiff voiced
 3 his criticisms contemporaneously with his criticisms of the Internal Affairs investigation itself.
 4 *Id.* at ¶ 14. Thus, as in *Connick*, “[t]his is not a case like *Givhan*, . . . where an employee speaks
 5 out as a citizen on a matter of general concern not tied to a personal employment dispute, but
 6 arranges to do so privately.” 461 U.S. at 148 n.8 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439
 7 U.S. 410, 414 (1979) (involving a teacher’s private complaints against racially discriminatory
 8 employment policies)). Considering the whole record, Plaintiff’s criticism of the firearms training
 9 policy was precipitated by and a mere extension of his dispute with his superiors over what
 10 Plaintiff perceived as an illegitimate investigation. *Cf. id.* at 148; *Desrochers*, 572 F.3d at 715-16.
 11 The focus of Plaintiff’s criticism was “not to evaluate the performance of the office” but rather to
 12 express his personal disagreement with an internal office policy during an ongoing disciplinary
 13 investigation into his own conduct at the shooting range. *Connick*, 461 U.S. at 148.

14 In summary, having considered the content, form, and context of Plaintiff’s various
 15 statements, as revealed by the whole record, the court concludes that in each instance Plaintiff
 16 spoke “not as a citizen upon matters of public concern, but instead as an employee upon matters
 17 only of personal interest.” *Id.* at 147. Plaintiff’s speech is therefore not entitled to First
 18 Amendment protection, and the first claim for relief will be dismissed accordingly.

19 **B. Tortious Constructive Discharge**

20 Plaintiff next asserts a state law claim against Storey County for tortious constructive
 21 discharge based on the events preceding his resignation on August 26, 2008. Under Nevada law, a
 22 claim for tortious constructive discharge requires proof that: (1) the employee’s resignation was
 23 induced by actions and conditions that are violative of public policy; (2) the employer’s actions or
 24 working conditions were so aggravated and intolerable that a reasonable person in the employee’s
 25 position at the time of resignation would feel compelled to resign; (3) the employer had actual or

1 constructive knowledge of the intolerable actions and conditions and their impact on the employee;
2 and (4) the situation could have been remedied. *Martin v. Sears, Roebuck & Co.*, 899 P.2d 551,
3 553 (Nev. 1995). While Defendants seek dismissal under the first and second prongs, this court
4 need only reach the first.

5 Nevada recognizes the common law cause of action for tortious discharge as a public policy
6 exception to the at-will employment doctrine. *Wayment v. Holmes*, 912 P.2d 816, 818 (Nev.
7 1996). Such actions “are severely limited to those rare and exceptional cases where the employer’s
8 conduct violates strong and compelling public policy.” *Sands Regent v. Valgardson*, 777 P.2d 898,
9 900 (1989). “To support a claim of tortious discharge, the evidence produced by the employee
10 must be concrete and establish outrageous conduct that violates public policy.” *State v. Eighth
11 Judicial Dist. Court*, 42 P.3d 233, 240 (Nev. 2002). Examples of qualifying public policy
12 violations include discharging an employee for filing a workmen’s compensation claim, *Hansen v.
13 Harrah’s*, 675 P.2d 394, 397 (Nev. 1984); for refusing to work under unreasonably dangerous
14 conditions, *D’Angelo v. Gardner*, 819 P.2d 206, 216 (Nev. 1991); and for reporting or refusing to
15 participate in illegal activity, *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1069 (Nev. 1998). By
16 contrast, the Nevada Supreme Court has declined to recognize a common law cause of action for
17 tortious discharge in age discrimination cases due to the availability of statutory remedies, *Sands*,
18 777 P.2d at 899-900; where an assistant district attorney was terminated for conduct that exceeded
19 his ethical obligations and constituted insubordination, *Wayment*, 912 P.2d at 818-19; and in
20 “mixed motives” cases where the employee’s protected conduct is not “*the proximate cause* of his
21 discharge,” *Allum*, 970 P.2d at 1066.

22 Plaintiff contends that Storey County violated public policy and induced his resignation by
23 retaliating against him for his speech. *See* Doc. #5, ¶¶ 33-34; Doc. #10, p. 6. Specifically, Plaintiff
24 alleges in his complaint that his “speech with respect to the Internal Affairs investigation, the
25 firearms training tactics, and wage and hour policy fostered important Nevada public policy,” and
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1 that he was “suspended and constructively discharged . . . as *the* proximate result of Defendants’
 2 animus against [these] activities.” Doc. #5, ¶¶ 33-34. As the court has already concluded,
 3 however, Plaintiff’s speech as a public employee was unprotected speech under the First
 4 Amendment. Further, there does not appear to be any strong and compelling Nevada public policy
 5 precluding the suspension or termination of a public employee for speech not protected by the First
 6 Amendment. Plaintiff therefore fails to state a claim for tortious discharge under Nevada law.

7 **C. Family and Medical Leave Act**

8 Plaintiff next claims that Sheriff Miller and Storey County violated the FMLA by
 9 disciplining him in November 2007 for going out to socialize with co-workers after taking FMLA-
 10 qualified sick leave to care for his sick mother. *Id.* at ¶¶ 6-10. Defendants argue the claim is time-
 11 barred. Doc. #13, pp. 12-13.

12 An action for violation of the FMLA must ordinarily be brought “not later than 2 years after
 13 the date of the last event constituting the alleged violation for which the action is brought.” 29
 14 U.S.C. § 2617(c)(1). Here, the alleged violation occurred sometime in November 2007; yet
 15 Plaintiff did not file his original complaint until February 25, 2010, and he did not assert a claim
 16 under the FMLA until he filed his first amended complaint on March 22, 2010. Even assuming the
 17 FMLA claim relates back to the date of the original complaint, *see* Fed. R. Civ. P. 15(c)(1), the
 18 claim is untimely under the two-year statute and will be dismissed

19 Plaintiff points out that subsection (2) of the same statute provides a three-year limitations
 20 period for actions “brought for a willful violation of the FMLA,” 29 U.S.C. § 2617(c)(2), and he
 21 argues that “[i]n the event the jury finds a willful violation existed under this set of facts, the action
 22 would be timely.” Doc. #19, p. 1. However, Plaintiff has failed to allege a willful violation of the
 23 FMLA in his complaint. *See* Doc. #5, ¶¶ 6-10, 36-37.

24 **D. Defamation**

25 Plaintiff concedes in his sur-reply that his defamation claim against Miller, based on an

1 incident occurring in December 2007, is time-barred under the two-year limitations period of
2 Nevada Revised Statutes § 11.190(4)(c). Doc. #19, p. 1; *see also* Doc. #13, p. 16. Accordingly,
3 the claim will be dismissed with prejudice.

4 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's First
5 Amended Complaint (#9) is GRANTED as to all claims.

6 IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Plaintiff's Complaint
7 (#4) and Motion for Re-Submission of Defendants' Motion to Dismiss Plaintiff's Complaint (#6)
8 are DENIED as moot.

9 IT IS SO ORDERED.

10 DATED this 10th day of November, 2010.



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13 LARRY R. HICKS
14 UNITED STATES DISTRICT JUDGE
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